Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1995

RICHARD WILLIAMS,

Defendant/Petitioner

v.

UNITED STATES OF AMERICA,

Plaintiff/Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED FOR REVIEW

i

Whether the trial court erred in admitting over objection the reading of Defendant's testimony concerning extensive travel of the Defendant from a previous trial where the travel was not shown to be connected to any criminal activity.

Whether the government complied with the procedural requirements of 21 U.S.C. §851 when an information seeking enhanced sentencing was filed in Defendant's first trial but not refiled in Defendant's two subsequent trials.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

Plaintiff/Respondent:	United States of America
Defendant/Petitioner:	Richard Williams
Co-Defendant:	William Scott Hames
Attorney for Plaintiff/Respondent:	Mary Jane Stewart
Attorney for Defendant/Petitioner:	Tom Jarrard
Attorneys of Record for Co-Defendant:	Jake Arbes Steven H. Sadow
Victim:	United States of America

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United States v. Williams, 954 F.2d 668, (1992)

United States v. Williams, 59 F.3d 1180, (1995)

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Petition seeks the review of the Judgment entered by the United States Court of Appeal, 11th Circuit, dated July 31, 1995, in the case: The United States of America v. Richard Williams and William Scott Hames, Case Number: 92-9253.

Following the entry of this Judgment a Petition for Rehearing and a Request for Suggestion of En Banc Reconsideration was filed on August 22, 1995. An Order was entered denying the Petition for Rehearing on October 4, 1995.

This Court has jurisdiction to review the Judgment entered by the United States Court of Appeals for the 11th Circuit pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED IN THE CASE

The following statutes are involved in this case:

28 U.S.C. §1254
Courts of Appeals;
Certiorari; Certified Questions

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) by certification at any time by a Court of Appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. §1291
Final Decisions of District Courts

That Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District for the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited

to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

21 U.S.C. §851
Proceedings to Establish
Prior Convictions

(a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before a trial, or before entry of a plea of guilty, the United States' attorney files an information with the Court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States' attorney the facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(a)(2) And information may not be filed under this section if the increased punishment which

maybe imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

STATEMENT OF THE CASE AND FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Course of Proceeding

An indictment was filed in this case on January 23, 1990 charging the following six defendants with two criminal counts: (1) Larry Ronald Duke; (2) William Scott Hames; (3) Harry Lee; (4) Bruce McArthur; (5) Richard Williams; (6) Michael D. Taylor;

Count One of this indictment charges the Defendants with knowingly and willfully conspiring together to possess marijuana with the intent to distribute. Count Two charges that the Defendants attempted to possess marijuana with the intent to distribute it. The events leading to these charges arose out of a reverse role investigation wherein law enforcement officers and their paid informant played drug dealers.

On January 26, 1990, Richard Williams was arraigned on the charges and entered a plea of not guilty on both counts before Magistrate John Smith. Richard Williams was tried before a jury, and the jury

entered a verdict finding Williams guilty on counts One and Two on April 11, 1990.

On June 6, 1990, Richard Williams was sentenced to serve 264 months on each count to run concurrently to be followed by a ten-year supervised release term. A Notice of Appeal was timely filed on June 11, 1990.

That Appeal resulted in a reversal by the Court of Appeals, Eleventh Circuit based upon the exclusion by the Trial Court of evidence of compensation paid to the government informant used to uncover the alleged conspiracy.

A new trial, held in August of 1992, resulted in a mistrial.

Following a third trial, a jury entered a verdict finding Williams guilty on count Two on October 23, 1992. On December 3, 1992, Richard Williams was sentenced to serve 151 months, to be followed by a ten-year supervised release period. A Notice of Appeal was timely filed on December 10, 1992. The Government filed a Notice of Cross-Appeal on December 31, 1992.

Following briefing and oral argument on this case, a Judgment was entered on July 31, 1995, affirming Defendant Williams' conviction and granting the Government's Cross-Appeal. The effect of granting the Cross-Appeal was to vacate Defendant Williams' sentence and remand the case for an enhanced sentencing.

On August 22, 1995, Defendant Williams filed a Petition for Rehearing with the Court of Appeals, Eleventh Circuit. This Petition for Rehearing was denied by an Order dated October 4, 1995.

The indictments filed against Williams and his co-defendants were the result of an extensive "reverse sting" operation. This operation began in Texas and concluded in Georgia. (R21-11, R21-16). The operation uncovered an elaborate plan for the delivery and distribution of a large quantity of marijuana. (R21-25). Many hours of conversations and meetings were recorded by video and audio equipment and exhibited to the jury. (R22-85, R22-97, R22-102). Every co-defendant except for Williams appeared on tape, was identified, and assigned a role in the operation. Williams did not appear on the tapes and was never mentioned. He was, however, arrested at the delivery site. (R22-121).

Facts Material to the Questions Presented

Defendant Williams testified on his own behalf at a previous trial of this case. During this testimony, Defendant Williams testified concerning travel undertaken prior to his arrest. Defendant Williams did not testify at the second or third trial of this case. During the third trial, however, his prior testimony from the first trial concerning this travel was read into evidence over objection. (R23-59). In arguing for its admissibility, counsel for the United States Government argued that this evidence would be used to show "motive." The Government argued that the life styled depicted in Williams' testimony by reference should lead to the conclusion that Williams was in Atlanta to

"participate in the distribution of the marijuana." (R23-89). At no time was this travel shown to be other than innocent.

Pursuant to 21 U.S.C. §851, a sentence imposed for conviction under 21 U.S.C. §841 may be "enhanced" where there has been a prior conviction if the defendant is given notice of an intent to seek enhancement. This information seeking enhancement must be filed with the Court and a copy provided to the Defendant before trial. 21 U.S.C. §851(a)(1). An information was filed and served upon counsel for Williams prior to his first trial on April 9, 1990. (R1-97-1). The information was used to increase the punishment given to Williams after conviction in his first trial. An appeal of that conviction resulted in reversal and remanded by the Court of Appeals. (R1-159-1). A second trial was held and declared a mistrial. (R1-184-1). Finally, a third trial resulted in conviction on the possession charge against Defendant Williams. At the sentencing hearing following this conviction, the Government admitted that they had not filed a new information, but were relying on the information from the first trial. (R26-8). The Court of Appeals held that once the information was filed, it was not necessary that it be refiled for each consecutive trial in the same court.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction was originally invoked by the United States District Court,

Northern District of Georgia under 18 U.S.C. §3231 based on alleged violations of 21 U.S.C. §841 and 21 U.S.C. §846.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

PRIOR TESTIMONY

The Government should not have been allowed to read into evidence Williams' testimony from his first trial. The decision to affirm the Trial Court in allowing the admission of this testimony is contrary to decisions in other circuits and creates a confusion among the circuits. While prior testimony is generally admissible, as with all evidence, its admissibility is subject to the Federal Rules of Evidence. Defendant Williams objected to the portion of the prior testimony relating to travel, which illustrates extrinsic conduct. As evidence of extrinsic conduct, prior testimony is not admissible only to prove a character trait of the defendant and that he is acting in conformity therewith; nor is it admissible when its probative value is substantially outweighed by its prejudicial impact. The Government used Williams' testimony to highlight aspects of his character. The introduction of this evidence had a severe prejudicial impact. Adequate consideration of the impact of the Federal Rules of Evidence under the admissibility of this evidence was not given by the Trial Court.

Both the Trial Court and the July 31, 1995 opinion of the Court of Appeals, Eleventh District rely on Harrison v. United States, 392 U.S. 219 (1968) to support the admissibility of the prior testimony into the evidence of this case. A reliance upon Harrison fails to consider the fact that the admission of prior testimony, just like any other evidence, is subject to the Federal Rules of Evidence. Edmunds v. United States, 273 F.2d 108 (D.C. Cir. 1959). As specifically stated in both Harrison and Edmunds, prior testimony must "otherwise be admissible" before being admitted in the trial of the case pending before the Court. "Otherwise admissible" is explained by saying prior testimony may be admitted, "assuming it otherwise satisfies the standards of relevancy and materiality." United States v. Grunewald, 164 F.Supp. 614 (S.D.N.Y. 1958).

The testimony of Williams read into the evidence of this case concerned extrinsic conduct of Defendant Williams. Before this evidence was admitted, it should have been subjected to a two-part test to determine its relevancy and materiality. United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). This test serves to determine whether the testimony is "otherwise admissible".

In Beechum, the defendant was charged with stealing a silver dollar from the mail. The government sought to introduce two credit cards found in defendant's wallet at the time of the arrest. These cards belonged to others and were also missing from the mail. The government sought to introduce these cards to show that the defendant intended to keep the coin. The defendant's intent to keep this coin was in dispute and the government's argument was that if he kept the cards, he intended to keep the coin as well. Beechum. Williams' testimony describes travel made prior to his arrest. The government argues that this extrinsic conduct illustrates the fact that Williams did in deed have knowing intent to participate in the marijuana distribution scheme. This use is identical to the use of the cards in Beechum, and the two step test from that case should apply to the admissibility of the evidence here.

Beechum's two part test incorporates and applies Federal Rules of Evidence 403 and 404. According to Beechum, first, the "evidence must be relevant to an issue other than the defendant's character." Beechum at 911. Second, the prejudicial impact of the evidence may not substantially outweigh its probative value. Beechum at 911. The prior testimony admitted at trial does not meet either of the Beechum tests and is therefore not admissible. The Trial Court did not adequately consider the Beechum case and the interplay of the Federal Rules of Evidence with the Harrison decision.

The prior testimony of Defendant Williams was used by the government to show the Defendant's character and that he acted in conformity therewith. This is in direct conflict with Rule 404. Additionally, under Rule 403 of the Federal Rules of Evidence, there should have been a weighing of the equities to determine whether the value was outweighed by the prejudicial impact of this evidence. The highly prejudicial impact of this evidence and the inferences drawn therefrom should have outweighed any value of this travel to the case before the Court and should have failed the second test of Beechum. Therefore this evidence should have been excluded.

The extrinsic evidence of prior travel, not shown to be other than innocent, was used in this case in a manner similar to the use in the case of the United States v. Afgehei, 869 F.2d 670 (2nd Cir. 1989). The Government used this evidence to suggest that Williams' travels showed a propensity or demonstrated a likelihood that he was actually involved in the marijuana distribution scheme present to the jury. The correct and adequate application of the Federal Rules of Evidence both in regards to the admissibility of prior testimony and all other evidence is of great importance. The different standard used in Afgehei and this case confuse the rules concerning prior testimony and the Federal Rules of Evidence.

II.

SENTENCE ENHANCEMENT

Defendant Williams' sentence should not have been vacated and the case remanded for enhanced sentencing under 21 U.S.C. §851. In doing so, the Eleventh Circuit ignored their own rule of strict construction and created a conflict between the Circuits. The Government, by not notifying Williams or the Court of the intention to use a prior conviction for such enhancement failed to comply with the mandatory procedures of 21 U.S.C. §851 and therefore enhancement would be improper. According to numerous cases both in this Circuit and around the country, the requirements of 851 are to be strictly construed. The filing of an information in an earlier trial does not meet the standard of strict compliance. Clarification of this procedure is of exceptional importance to this case and to the Courts.

Pursuant 21 U.S.C. §851, sentence imposed for a conviction under 21 U.S.C. §841 may be "enhanced" where there has been a prior conviction. However, in order to increase the punishment of the Defendant the U.S. Attorney is required to file information with the Court stating in writing the previous convictions to be relied on before trial. 21 U.S.C. §851(a)(1). In this case, the only information filed and served upon counsel for Williams was served on April 9, 1990 prior to his first trial. (R1-97-1). Even then the information was filed after the jury was empaneled. See. Kelly v. United

States, 29 F.3d 1107 (7th Cir. 1994). Since that time there is no evidence or mention in the transcript or in the record of this case of any mention by the Government that enhancement of Defendant Williams' conviction would be sought. No information was filed with Court or served on the Defendant prior to Williams' most recent trial. In fact the Trial Judge of the third trial had no notice than any enhancement would be sought. (R26-9).

The initial notice of enhancement was filed after the jury was empaneled in the first trial. A decision in the Seventh Circuit, Kelly, requires that notice be given prior to trial, which means prior to jury selection. That was not done in this case. The passage of time and three trials does not cure this initial failure to timely file the notice of enhancement.

Strict compliance with the procedural requirements of the Statute by the Government is required before any sentence may be enhanced, "harmless error" does not apply. United States v. Nolan, 495 F.2d 529 (5th Cir. 1974); cert denied 419 U.S. 966, United States v. Olson, 716 F.2d 850 (11th Cir. 1983). The strict compliance with the procedural requirements of §851 is of especial importance in the timing of the Government's filing with the Court and service on the Defendant of an information signifying the Government's intent to rely on a prior conviction. United States v. Weaver, 905 F.2d 1466, 1481 (11th Cir. 1990). This helps the Defendant decide on the wisdom of proceeding to trial versus seeking a plea agreement. United States v. Johnson, 944 F.2d 396 (8th Cir. 1991).

The filing of the original information in this case does not rise to the level of strict compliance required under this Statute or prior cases of this Circuit.

When Williams' conviction was reversed by this Court and the case remanded, the trial process began again. In order for enhancement to be properly administered pursuant to §851 an information must be filed "prior to trial." Since this third trial was a new trial, independent of any previous trial, before the Government could seek enhancement, they were required to file a new information. The fact that Williams was aware of the possibility of sentencing enhancement from his first trial is irrelevant. See Nolan and Weaver. In Nolan, the defendant admitted his prior conviction at sentencing and never challenged the validity of its conviction. Nolan at 533. He was also advised at arraignment that his sentence could be for the enhanced duration. Nolan at 533. Despite the knowledge, the Court went on to hold that the filing of the information was required and that knowledge was irrelevant. Nolan at 533. Here the situation though slightly different, is analogous to that of Nolan and Weaver. The failure of the Government to timely file the information cannot be saved by the knowledge of the Defendant concerning the Government's intentions.

Failure to file the information as required by 21 U.S.C. §851(a) deprives the Court of any jurisdiction to impose and enhance sentence. United States v. Cevallos, 538 F.2d 1122, 1128 (5th Cir.

1976), aff'd 574 F.2d 854. The decision of the Court of Appeals to vacate the Trial Court's determination of the improperness of any enhancement and to remand the case for enhanced sentencing is contrary to both the legislative intent behind 21 U.S.C. §851 and the prior decisions of the Courts of Appeals calling for strict compliance with those rules.

III.

CONCLUSION

For the above and foregoing reasons, the questions presented in this Petition should be certified and addressed by this Court. Inadequate attention to the Federal Rules of Evidence and their relation to the introduction of prior testimony has been given by the Eleventh Circuit Court. This has created an irreconcilable conflict with the Second Circuit. Additionally, the prior decisions of the Eleventh Circuit and other Circuit Courts calling for strict compliance with 21 U.S.C. §851 were improperly disregarded in the decision to remand for enhanced sentencing.

Respectfully this 22nd day of March, 1996.

CAREY, JARRARD & WALKER

TOM JARRARD

APPENDIX

A-1

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Richard WILLIAMS and William Scott Hames, Defendants-Appellants, Cross-Appellants.

No. 92-9253.

United States Court of Appeals, Eleventh Circuit.

July 31, 1995.

Robert Thomas Jarrard, Carey, Deal, Jarrard & Walker, Gainesville, GA for Richard Williams.

Jake Arbes, Atlanta, GA, for William Scott Hames.

Mary Jane Stewart, Amy Weil, Asst. W.S. Attys. Atlanta, GA, for appellee.

Appeals from the United States District Court for the Northern District of Georgia.

Before DUBINA, Circuit Judge, RODNEY and ESHBACH*, Senior Circuit Judges.

RONEY, Senior Circuit Judge:

Richard Williams was convicted on both counts of a two count indictment for knowingly conspiring to possess with the intent to distribute marijuana and attempted possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841 and 846. William Scott Hames was convicted on the second count only. Both defendants appeal their convictions. Hames appeals his sentence as outside the Guidelines and in contravention of the Guideline's statutory mandate. The Government cross-appeals the district court's failure to consider Williams' prior conviction in sentencing. We affirm both convictions and Hames' sentence, and vacate and remand Williams sentence.

The facts of this case are fully set forth in our previous opinion *United States v. Williams*, 954 F.2d 668 (11th

Cir.1992). Those facts are briefly summarized as follows: David Brown, a drug dealer turned Government informant, had an arrangement to receive twenty-five percent of the value of any money or drugs seized or collected as a result of his actions as an informant. Brown arranged for a $3.2 million, 18,000 pound marijuana deal that would involve several individuals, including defendants Williams and Hames.

Hames and Williams were convicted on both counts of the indictment at their first trial, but we reversed because the district court improperly refused to allow the defense to impeach Brown on his considerable contingency fee arrangement with the Government. *United States v. Williams*, 954 F.2d. at 672. The second trial ended in a mistrial due to a juror's misconduct. The trial resulted in finding of guilt for Hames on both counts and Williams on the second count.

HAMES

Hames contends that: (1) the district court erred in failing to give a specific cautionary instruction to the jury on the credibility of Brown due to his arrangement with the Government; (2) his due process rights were violated; (3) the districts court misapplied the Sentencing Guidelines; (4) certain Guidelines applied to him were enacted without proper legislative authority.

1. Hames: Special Jury Instruction

Hames' defense at trial was that he believed that he was cooperating with Brown as a Government informant, pursuant to Brown's instructions. Brown, with his huge financial incentive to maximize the amount of drugs and money involved in deals that he performed for the Government, was the only one to provide testimony contradicting Hames' defense.

[1] A defendant is entitled to a special jury instruction on the credibility of a Government informer if the defendant requests it and the testimony implicating the accused is elicited solely from the informer. *United States v. Garcia*, 528 F.2d 580, 587-88 (5th Cir.), *cert.denied*, 429 U.S. 898, 97 S.Ct.262, 50 L.Ed.2d 182 (1976). The purpose behind such a policy is to ensure that no verdict based solely on the uncorroborated testimony of a witness who may have good reason to lie is too lightly reached.

[2] In this case, the defense failed to ask for a special cautionary instruction regarding Brown's credibility. Therefore, the failure to give the instruction is reversible only if it was plain error. *United States v. Martinez*, 763 F.2d 1297 (11th Cir.1985). "This Court has recognized that in reviewing a trial for plain error, the touchstone is fundamental fairness." *United States v. Garcia*, 528 F.2d at 588.

[3] A careful review of the record indicates that the jury was sufficiently informed as to how to deal with the credibility of a person in Brown's situation so as to make the failure to

give a special instruction not fundamentally unfair to Hames. The district judge in his jury instructions cautioned the jury that

> [i]n deciding whether you believe or do not believe any witness, I suggest that you ask yourselves a few questions: did the person impress you as one who was telling the truth? Did he have a personal interest in the outcome of the case? Did the witness seem to have a good memory?
>
> * * * *
>
> The testimony of some witnesses must be considered with more caution that the testimony of other witnesses. For example, a witness who has been promised that he will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his own case, may have a reason to make a false statement because he wants to strike a good bargain with the Government.
>
> * * * *
>
> ... So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

We have held that it is not necessary to mention a witness by name if the instructions "are sufficiently focused to remind the jury of the special credibility issue posted by the testimony of contingently motivated witnesses."

United States v. Wilson, 904 F.2d 656 (11th Cir.1990), *cert. denied sub nom. Bogus V. United States*, 502 U.S. 889, 112 S.Ct.250, 116 L.Ed.2d 205 (1991).

These instructions followed the prosecutor's own statements in closing argument telling the jury that the testimony of a person in Brown's position should be viewed with some skepticism. In arguing how the jury should view witnesses for credibility purposes after saying that they testimony of a witness with a felony conviction should be looked at with special caution, she said:

> obviously someone who is cooperating with the government in hopes of money or some other benefit, that's a motive and you should look at that. I tell you to look at those reasons, those motivations, and look at them hard... Vol. 23. page 82.

During the argument she correctly stated the issue for decision as to Hames:

> You have heard Hames's claim that he was acting as an informant. And the truth of the matter is, if you think he was acting as an informant, if you believe the government has not proved beyond a reasonable doubt that he did not have a reasonable belief that he was acting as an informant, then you can't convict him. Vol. 23, page 91.

Again in rebuttal, the problems with David Brown as a credible witness were pointed up by the prosecution:

> I don't hold David Brown up to you as a model for your children. You don't want your children to grow up to be David Brown. In fact, you may want to hold him up as a model but it's of what maybe not to be as apposed to what to be. Vol.223, page 128.

Brown's economic involvement with the success of the Government in this prosecution was spelled out in detail in the facts. There is not doubt whatsoever that the jury was well aware that the testimony of David Brown was to be viewed with caution. That is the only function of a special instruction.

2. Hames: Due Process Claim

[4] Hames contends that police misconduct and the Government's involvement in his crimes constitute outrageous conduct warranting reversal. The contingency fee agreement, the release of certain drugs to unauthorized persons, and the Texas officers' improper and illegal actions, which did not relate to the activities of Hames and Williams, do not rise to the level of a due process violation. *United States v. Savage*, 701 F.2d 867, 869 (11th Cir.1983).

3. Hames: Sentence

We affirm the district court's enhancement of Hames' sentence due to his manager/supervisor status. We review the district court's sentencing decisions for clear error and find none. *United States v. Carrillo*, 888 F.2d 117, 118 (11th Cir.1989). Hames played an active role in

organizing the offense and his sentence was properly enhanced accordingly.

Contrary to Hames' argument, the Sentencing Commission did not overstep its bounds in promulgating Sentencing Guideline § 2J1.7 Section 2J1.7 calls for a three level enhancement if the defendant commits a federal offense while on release. 18 U.S.C. § 3147 authorized the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act.

WILLIAMS

Richard Williams appeals the admission by transcript of certain of his testimony from his first trial in his third trial and the sufficiency of the evidence for conviction. We affirm his conviction.

1. Williams: Prior Trial Testimony

[5] Williams testified at his first trial, but not at this trial. The Government here read before the jury a transcript of Williams' prior testimony. The court properly ruled, as Williams now concedes, that generally statements made under oath in a prior trail by a criminal defendant who then waived his constitutional right are admissible in a subsequent trail. *Harrison v. United States*, 392 U.S. 219, 223, 88 S.Ct.2008, 2010 ,20 L.ed.2d 1047 (1968); *United States v. Baker*, 850 F.2d 1365, 1370 (9th Cir.1988). On this appeal, however, Williams argues that the testimony regarding prior travels violated Federal

Rules of Evidence 403 and 404, which prohibit the use of testimony if its probative value is substantially outweighed by the danger of unfair prejudice, or it is used to demonstrated conformity with a bad character.

[6] Williams points out that his travels were not shown to be anything but innocent, there is no showing that the financing of these trips was done by anyone involved in crime, and there is no evidence that the travel was in any way connected with illegal activity. The evidence did show that Williams' travels were for the purpose of looking for ways to make money, an economic motive for his involvement in the drug deal. As such, the admission of the evidence was probably not an abuse of discretion, and in any event, any error would be harmless. See *United States v. Saget*, 991 F.2d 702, 709 (11th Cir.), *cert. denied sub nom. Johnson v. United States*, --- U.S.---, 114 S.Ct.386, 126 L.Ed2d 344 (1993). This case is unlike *United States v. Afjehei*, 869 F.2d 670 (2d Cir.1989), where a conviction was reversed because prior travel evidence was used to support the Government's explicit suggestion that Afjehei's travels must have been part of an ongoing drug enterprise. The record in this case, both during the trial and during closing argument, shows no such improper use of this testimony. There was no suggestion here the Williams' travels were part of an ongoing enterprise.

2. Williams: Sufficiency of Evidence

[7] Viewed in light most favorable to the jury verdict, there is sufficient evidence to support Williams' conviction. *United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir.1984). Williams was at the house where two tons of marijuana were delivered, he helped to unload the drugs, and moved them about the basement. There was testimony that Williams was actively involved in the delivery of marijuana.

GOVERNMENT'S CROSS-APPEAL

3. Williams: Enhancement of Sentence

[8] At Williams's sentencing, the Government pointed out a prior conviction for the purposes of enhancement. The district court refused to consider the prior conviction because the Government did not refile the sentencing information prior to the trial for which Williams was being sentenced. The Government appealed this decision. We reverse and hold that once the information was filed, it was not necessary that it be refiled for each consecutive trial in the same court.

21 U.S.C.A. § 851 provides for the proceeding to establish prior convictions for sentencing purposes. "No person who stands convicted of under (this drug abuse section) shall be sentenced to increased punishment by reason of ... prior convictions, unless before trial... the United States attorney files an information with the court (and serves a copy of such information of the person or the counsel for the person) stating in writing the previous convictions to be relied upon."

[9] There are two purposes for this provision and the subsequent proceedings set forth in section 851. The *first* is to allow the defendant to contest the accuracy of the information. The *second* is to allow defendant to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of potential guilty verdict. *United States v. Johnson*, 944 F.2d 396 (8th Cir.). cer. denied, 502 U.S. 1008, 112 S.Ct 646,116 L.Ed.2d 663 (1991).

Clearly the information was filed "before trial" Item 97 of some 200 items in Volume 1 of 26 of the Record on Appeal, noted on page 5 of a 16-page docket sheet for this case, is a notice pursuant to section 851 which states that the Government will seek enhancement of defendant Williams' sentence based on a described drug conviction in a state court in Florida. This first volume documents all of the proceedings in Williams' case from indictment through the reversal of the first trial, the mistrial of the second, the third trial, and to the notice of this appeal.

Had not two trails intervened between the filing and this trial, the mandate of the statute unarguably would have been met. the defendant through the same attorney addressed this conviction at the first sentencing, when it was used for enhancement.

There seems to be no suggestion that the information can be filed too early. All of the cases raising an issue about

the time of filing involve whether the information was filed soon enough, i.e. before a jury selection, before jury impanelment, after the trial had begun, and so forth. Or about the refinements of service and whether technical omissions in connection with service or filing can be overcome by the knowledge of the defendant an his attorney. Those cases are irrelevant and need not be listed here.

There are no such questions here. The same attorney represented Williams at all three trials, knew that the information had been filed, knew about the prior convictions, which was admitted, and had addressed that prior conviction at the sentencing in the first trial. The defendant knew the effect of such enhancement and knew the consequences of a guilty verdict, having been sentenced to 264 months with the use of this prior conviction for enhancement.

The question is whether the information was filed too long before trial, or whether the information must be filed for each trial and retrial. There seems to be no support in the statute, in the cases, or in reason for such a requirement. The established purposes of the filing and service are fully met upon the first filing and service, at least where the case involves the same attorneys, the same court, and the same indictment. The fact that there were different sentencing judges should make no difference. The court records clearly showed that a properly prepared information had been filed "before trial."

Accordingly, we vacate the sentence of Williams and remand to the district court for resentencing.

REVERSED IN PART, AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

UNITED STATES DISTRICT COURT

NORTHERN District of GEORGIA

UNITED STATES OF AMERICA

V.

Case Number 2:90-cr-01-WCO

RICHARD WILLIAMS
(True Name: Robert Nelson Jones)

JUDGEMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

THE DEFENDANT: was found guilty on count(s) one and two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

21 USC 846 and 841 Conspiracy to Possess with Intent to Distribute in Excess of 1000 Kilograms of Marijuana, a Class A felony

21 USC 846 Possession with Intent to Distribute in Excess of 1000 Kilograms of Marijuana, a Class A felony

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 which shall be due immediately. It is further ordered that the defendant

notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

June 6, 1990
Date of Imposition of Sentence

/s/WILLIAM C. O'KELLEY
Signature of Judicial Officer

WILLIAM C. O'KELLEY
United States District Judge
Name and Title of Judicial Officer

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SIXTY-FOUR (264) MONTHS on each of counts one and two to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TEN (10) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that

a that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions: (SEE BELOW).

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. The defendant shall pay any fine, the cost of imprisonment, cost of supervision and special assessment that is imposed by the judgment and remains unpaid at the commencement of the term of supervised release at the minimum rate of $25.00 per month.

2. The defendant shall make full and complete disclosure of personal and business finances and shall submit to an audit of personal and business financial records as requested by the U.S. Probation Office.

3. The defendant shall participate in a substance abuse program, which may include testing to determine if the defendant is using illicit substances, at the direction of U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment.

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer,

3) the defendant shall report to the probation officer as by directed by the court or probation officer and shall submit a truthful and complete written report within the first days of each month;

4) the defendant shall answer truthfully all in quires by the probation officer and follow the instructions of the probation officer,

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute or administer any narcotic or other controlled substance, or paraphernalia related to such substances except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted with a felony unless granted permission to do so by the probation officer.

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of law enforcement agency without the permission officer,

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Richard WILLIAMS, William Scott Hames, Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry Ronald DUKE, Defendant-Appellant.

Nos. 90-8575, 91-8284.

United States Court of Appeals,
Eleventh Circuit.

Feb. 27, 1992.

Tom Jarrard, Gainesville, Ga. (court appointed), for Williams.

Steven H. Sadow, Atlanta, Ga., for Hames.

Bruce S. Harvey, Atlanta, Ga., for Duke.

Mary Jane Stewart, Asst. U.S. Atty., Atlanta, Ga., for the U.S.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and HATCHETT, Circuit Judges, and GIBSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In these consolidated appeals, we reverse the convictions of two of the appellants because relevant evidence regarding how much money the government paid an informant in prior cases was excluded on the basis that such evidence would be too prejudicial to the government's case.

In November, 1989, William Scott Hames contacted Harry Lee about a marijuana contact in Texas, known to them as J.D. who undeknownst to them, served as a government informant. Thereafter, Lee contacted Larry Ronald Duke. After Hames showed Lee and Duke marijuana samples, they immediately discussed buying a large quantity of marijuana, with Duke paying Hames and Lee $200,000 each for their participation. As a result of these

discussions, Hames and Lee flew to Corpus Christi, Texas, to discuss buying marijuana from the informant. Lee found the marijuana unsatisfactory, and he and Hames returned to Atlanta, Georgia, to report the outcome to Duke. Shortly thereafter, Hames informed Lee that the informant had something that he wanted to show them.

In late November, 1989, Hames and Lee flew to Dallas, Texas, to meet with Duke and to discuss a scheduled meeting with the informant. On December 5, 1989, Deputy Sheriff James Spencer, working undercover, and the informant met Hames and Lee at the Dallas-Fort Worth Airport and drove them to Corsicana, Texas. Deputy Sheriff Ted Brooks, who at the time was also working undercover, acted as the drug organization's leader.[1] While in Corsicana, Hames, Lee, and the undercover law enforcement officers discussed the marijuana deal. According to Lee, Duke wanted 18,000 pounds of marijuana delivered to Georgia. The undercover officers showed Hames and Lee about 500 pounds of marijuana. Also Lee told Deputy Spencer that he had a buyer in Houston from Atlanta who wanted to purchase marijuana, and a buyer in Atlanta from Tallahassee, Florida who wanted to buy 7,500 pounds of marijuana.

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[1] Law enforcement officers later arrested Deputy Sherriff Brooks on marijuana charges.

On December 7, 1989, Deputy Spencer met with William Harvey Cox, the buyer from Atlanta and negotiated with Hames and Lee to deliver approximately 400 pounds of marijuana. Deputy Spencer sold the marijuana at $500 per pound, and Hames and Lee sold it to Cox for $575 per pound. Hames and Lee retained $26,000 in profit, and the marijuana load was subsequently recovered and Cox's driver arrested. Because they could not agree on the larger deal, Hames and Lee returned to Georgia. Thereafter, the informant called Hames and told him the sellers would deliver the marijuana to Georgia.

On December 20, 1989, Deputy Spencer met with Hames and Lee in the Atlanta area and discussed buying 16,000 pounds of marijuana at $450 per pound. Hames presented a 14-day plan, which Duke had prepared, and Lee explained that the marijuana would be stored at Duke's "Little Mulberry Farm" (the farm) in Bartow County, Georgia. Hames assured Deputy Spencer that Duke was the largest marijuana dealer on the eastern seaboard. After these talks, the deputies returned to Texas.

On December 26, 1989, Deputy Spencer and other law enforcement officers returned to Georgia with approximately 4,800 pounds of marijuana. On December 27, 1989, Hames, Lee, Deputy McArthur met with Deputy Spencer and further discussed the marijuana sale. On December 28, 1989, Hames, Lee, Deputy Spencer, the informant, and other law enforcement officers went to the farm. Lee also took Deputy Spencer and Deputy

Brooks to a house on Trickum Road to introduce them to Duke. In the meeting with Duke, the officers explained that they had three truckloads of marijuana weighing 16,000 pounds. Duke discussed his marijuana operation, including information regarding warehouses he owned across the country, and including boasting that he recently moved 70,000 pounds of marijuana in four days. He further assured them that he could move the first truckload of marijuana in about 90 minutes, and explained the off-loading and storage of the marijuana at the farm.

On December 29, 1989, the undercover agents delivered 4,800 pounds of marijuana to the farm where Duke, Hames, Lee, McArthur, and Richard Williams were present. Deputy Spencer provided a manifest, which he and Deputy Spencer provided a manifest, which he and Deputy Jones had prepared listing the box numbers and their weights. Thereafter, the men present formed an assembly line and unloaded the marijuana into the basement.

After the marijuana was unloaded, Duke, Williams, Lee, and Deputies Spencer and Brooks went inside the house and discussed the distribution plan. Duke changed the plan from moving out a 500-pound load and then a 1,000-pound load to moving the marijuana in 200-pound loads in a automobile driven by Williams. According to the new plan, Lee and Deputy Brooks would go to a hotel and wait for Williams to bring Deputy Brooks the money from the 200-pound load. Duke stressed that the marijuana and the money must never be in the same place at the same

time. He also indicated that he had one 10,000-pound buyer who paid in $2,000 bundles, and one buyer who paid in $5,000 bundles.

After the marijuana was in the basement, the deputies gave the arrest signal, and law enforcement officers apprehended all the participants, read them their Miranda rights, and loaded the marijuana back on the truck. Agents then returned the truck to the Georgia Bureau of Investigation in Decatur, Georgia, where an agent took samples from the boxes and determined that the samples were marijuana.

After arrest, Hames claimed that throughout the negotiations, he served as a confidential informant through an agreement with the informant. Hames, however, admitted that he never asked the informant which law enforcement agency he worked for, never made any tape recordings or notes, was never debriefed by a law enforcement officer, and never were any law enforcement officers identified to him prior to his arrest. The informant, however, denied ever making such an agreement with Hames.

PROCEDURAL HISTORY

A grand jury indicted Duke, Hames, Lee, McArthur, Williams, and others with conspiring to possess with the intent to distribute in excess of 1,000 kilograms of marijuana and attempted possession with the intent to distribute in excess of 1,000 kilograms of marijuana and attempted possession with the intent to distribute

in excess of 1,000 kilograms of marijuana, in violation of 21 U.S.C. § 846.

At trial, Williams denied involvement in this crime, claiming he was friends with Douglas Taylor, the lessee of the house, needed a place to stay, and had only arrived at the house the night before on his way to Detroit, Michigan. It was his understanding that Taylor was expecting a furniture delivery. He denied unloading the marijuana or even seeing any marijuana, asserting that he believed any noise was caused by movers delivering furniture. Moreover, Hames and Lee admitted that the first time they had seen Williams was the day they were arrested.

Also, Duke admitted being in Atlanta during December 1989, yet denied meeting with Hames and Lee to discuss a marijuana deal. He further stated that his brother owned a farm, that he had no interest in it, and that he had no knowledge or involvement in marijuana sale.

The jury convicted Duke, Hames, and Williams, the appellants in these consolidated appeals. The court sentenced Duke to life imprisonment without release, 10 years supervised release, a $25,000 fine, and special assessments totaling $100. The court sentenced Williams to 264 months imprisonment on each count to run concurrently, 10 years supervised release, and a $100 special assessment. Finally, it sentenced Hames to 360 months imprisonment, 5 years supervised release, and $100 in special assessments.

ISSUES

The following issues are presented on appeal: (1) whether the district court correctly excluded testimony concerning prior financial payments the informant received from law enforcement authorities; (2) whether the district court correctly rejected Duke's claim the he had been a victim of sentencing entrapment; and (3) whether the district court correctly imposed Duke's sentence pursuant to 21 U.S.C. § 851, rejecting his claim that the statute deprived him of his constitutional rights.

CONTENTIONS

The appellants contend that the district court abused its discretion in not allowing evidence regarding the informant's financial motive. Duke also contends that the government was involved in drug transaction to such an extent that he was rendered a victim of sentence entrapment. Finally, Duke challenges 21 U.S.C § 851(e)'s constitutionality, arguing that this statute precludes him from submitting a writ of habeas corpus, in violation of his equal protection and due process rights.

DISCUSSION

Informant's Testimony

[1] The district court has broad discretion in ruling upon the relevancy and admissibility of evidence. *United States v. Kelly*, 888 F.2d at 732, 743; (11th Cir.1989). This discretion,

however, does not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense. *Kelly*, 888 F.2d at 743, *United States v. Cohen*, 888 F.2d,770, 777 (11th Cir.1989).

[2] Hames's sole defense was that he was working under a good faith belief that he was working in cooperation with the informant. When Hames called the informant to testify, the court allowed the informant's testimony regarding how long he had been a paid informant, the percentage received from successful operations, his previous arrests and dispositions, and the amount of money paid in this case.[2] The court, however, excluded all testimony and defense exhibits indicating the total amount of money the informant had received since becoming a paid government informer, ruling the evidence irrelevant.[3] The

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[2] Texas officials arrested the informant on March 18, 1987, at a United States Boarder Patrol checkpoint with more than 100 pounds of marijuana and a firearm. The government immediately charged him in a federal criminal complaint, and a grand jury indicated him on April 3, 1987, however, the government dismissed the indictment in return for his cooperation in future drug transactions. In return, the government gave the informant twenty-five percent of all seized assets.

[3] The district court found the money amounts outrageous ("one of the worst situations [the court] had ever seen") and

government argues that the court correctly excluded this evidence, because it was irrelevant and unduly prejudicial. Both in brief and at oral argument, the government insisted that the amount of the payment, if introduced before the jury would "inflame and unduly prejudice the jury [against the government]".

By October, 1989, the government had paid the informant nearly $450,000 in reward money. Moreover, at the time of the informant's arrest in March, 1987, he only earned $1,000 per month. Additionally, at trial, the informant testified that he did not expect to receive twenty-five percent of the possible $7.2 million involved in the transaction, which somewhat misled the jury in calculating his compensation.[4]

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prejudicial to the government's case.

[4] During the government's cross-examination, the following exchange took place.

Q: Did you ever expect for the agents to really seize 7.2 million dollars?
A: No, Ma'am.
Q: Why not?
A: *It never happens that way.*
Q: You didn't know how much?
A: That's correct
Q: To get to the 7.2 million dollars, the marijuana would have had to have been turned over and sold, wouldn't it?
A: As it turned-as it turned out

Thus, after this testimony, the defense sought to introduce evidence proving that the informant had received twenty-five percent of a $1,258,000 seizure. Without this evidence, the jury had absolutely nothing to equate the twenty-five percent reward. This exclusion denied both Hames and Williams a fair trial. Because the informant actually testified in Williams and Hames's trial, we hold that the district court abused its discretion by prohibiting them from putting into evidence the amount of prior financial payments made to the informant.

[3] The jury had the right to know what may be motivating the witness, especially a government paid, regularly employed, informant-witness. If the amount paid an informant is felt by the government to be too prejudicial for an American jury to hear about, the solution is for the government to make reasonable payments; the solution is not for the court to rule the evidence irrelevant as too prejudicial. We have never approved of a

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yes, Ma'am.

Q: The law enforcement authorities had no intent of doing that, did they?

A: Absolutely not.

Q: You knew that, didn't you?

A: Yes, Ma'am.

Q: But you did expect you might get money from seizures of what amount of money might be there or from other assets, didn't you?

A: Yes, Ma'am.

rule which makes small payments to informants admissible, but large, outrageous payments inadmissible. The large and outrageous payments may be just the kind that are of the most help to the jury in arriving at the truth.

[4,5] Although the informant did not testify at Duke's trial, Duke contends that the government's admission of video and audio tapes with the informant's likeness and voice essentially serves as "testimony" and he should have been allowed to impeach this testimony. Likewise, he argues that the court abused its discretion in excluding evidence that an undercover officer was arrested after this investigation on drug charges. The law is clearly established that one may not introduce evidence to impeach a witness who does not testify. *See United States v. Wolfe*, 766 F.2d 1525 (11th Cir.1985). Thus, we affirm Dude's conviction.

Duke's Sentence

Duke challenges his sentence on two grounds: (1) he was a victim of sentence entrapment and (2) 21 U.S.C. Section 851(e) is unconstitutional. Duke stresses the fact that the informant introduced government agents into the operation and after the failed Cox transaction, the government allowed Hames and Lee to keep a $26,000 commission. He also points out the enormous incentive in selling the marijuana at half the market price, and the government's delivery of the marijuana without payment. Duke argues that he received an increased sentence because the

government set the marijuana quantity; thus, he argues that the government manipulated the transaction in order to get the mandatory minimum sentence.

[6] First, as a matter of law, we reject Duke's sentence entrapment theory. *See, United States v. Markovic*, 911 F.2d. 613, 616 (11th Cir.1990)(sentence entrapment no longer a viable defense); *United States v. Struff*, 701 F.2d 875, 877 n.6 (11th Cir.1983)(sentence entrapment defense did not survive *Hampton v. United States* 425 U.S. 484,96 S.Ct. 1646,48 L.Ed.2d 113 (1976). Because this circuit rejects this theory as a defense, we need not address it further.

[7] Secondly, section 851(a) prohibits the court from using a prior conviction to enhance a prior sentence, unless the government files an information listing the previous conviction. Section 851(e) states:

> No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Duke argues section 851(e) denied him the right to challenge his previous conviction with a writ of habeas corpus, thus violating his due process and equal protection rights. Other courts have addressed this issue and found the statute constitutional. *See, United States, v. Kinsey*, 843 F.2d 383 (9th Cir.1988);

Cirillo v. United States, 666 F. Supp. 613 (S.D.N.Y.1987); *United States v. Cirillo*, 566 F.Sup.1340 (S.D.N.Y.1983), aff'd 742 F.2d 1445 (2d Cir.1984).

In *Kinsey*, the Ninth circuit stated:
We hold that the sentence enhancement provisions of the Title 21 U.S.C. Section 841(b)(1)(A) and related Section 851(e) do not deny a criminal defendant his or her constitutional right to a jury trial but set forth aggravating circumstances the presence of which require a trial court to increase the sentence of a habitual offender.

Kinsey, 843 F.2d at 391-392.

Additionally, in *Cirillo v. United States*, 666 F.Supp. 613 (S.D.N.Y.1987), the court allowed the government to use a forty-two year old criminal conviction to enhance Cirillo's sentence. The court opined:

> Without [section 851(e)'s five year limitation period], records of the prior criminal convictions, going back many years, as for example in this case, forty-two years, would have to be preserved. The likelihood is that those persons who played a role, whether on half of the prosecution, defense, or witnesses, no longer would be available to give direct testimony as to alleged events attendant upon the entry of a plea under attack. Section 851(e) is wholly reasonable, both to effectuate the legitimate purposes of enhanced sentencing for recidivists, and to

eliminate a host of practical problems with respect to ancient records absent a provision.

Cirillo, 666 F.Supp. at 616. We agree.

In this case, the government filed a sentencing information indicating that Duke had two prior drug convictions which enhanced his sentence pursuant to 21 U.S.C. §§ 851, 846, and 841(b)(1)(A). Moreover, the prior convictions and drug quantities led to his life imprisonment without release sentence. Section 851(e)'s five-year limitation is reasonably tailored to impose enhanced sentences on recidivists. Accordingly, it is not unconstitutional. Consequently, the district court properly enhanced Duke's sentence.

Finally, Duke and his coconspirator set the quantity of marijuana when Hames and lee produced the fourteen-day plan for distributing 16,000 pounds of marijuana for $7.2 million. Additionally, Hames and Lee told Deputy Spencer that they could handle large quantities, and Duke had a prior conviction for importing 18 tons of marijuana. The appellants said they could move large quantities, and Duke tried to move this large quantity but with the wrong people. The fact that Duke now says, "the deal was too good to be true" is of no legal significance.

For the foregoing reasons, we reverse and remand this case as to Hames and Williams for a new trial. Additionally, we affirm Duke's convictions. and sentences.

AFFIRMED in part, and REVERSED and REMANDED in part.

UNITED STATES COURT OF APPEALS

For the Eleventh Circuit

No. 90-8575

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

RICHARD WILLIAMS,
WILLIAM SCOTT HAMES,

Defendants-Appellants.

91-8284
D.C. Docket No. 1:90-cr-01-WCO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY RONALD DUKE,

Defendant-Appellant.

Appeals from the United
States District Court for
the Northern District of Georgia

Before FAY and HATCHETT, Circuit Judges,
and GIBSON, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of convictions of the said District Court in these causes as to defendants-appellants Hames and Williams are hereby REVERSED and REMANDED to said District Court for a new trial; and that the judgment and sentence imposed. by the said District Court as to defendant-appellant Duke is hereby AFFIRMED in accordance with the opinion of this court.

Entered: February 27, 1992
For the Court:
Miguel J. Cortez, Clerk

/s/: KARLEEN MCNAIR
Deputy Clerk

UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA

v.

Case Number: 2:90-cr-001-5

RICHARD WILLIAMS

Defendant

JUDGMENT IN A CRIMINAL CASE

The defendant, RICHARD WILLIAMS, was represented by Thomas Jarrard.

The defendant has been found not guilty on count(s) One and is discharged as to such count(s).

The defendant was found guilty on count(s) Two after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

21 USC 846 Attempted Possession with Intent to Distribute in Excess of 1,000 Kilograms of Marijuana.

As pronounced on December 3, 1992, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing ReForm Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 0.00, for count(s) 2,

because the defendant has already paid the special assessment after a previous trial of this case.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the ____ day of _____, 19 ___.

/s/ROBERT L. VINING, JR.
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 151 months.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:"

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own, possess or have under his control a firearm or other dangerous weapon.

4. If required by the Probation Officer, the defendant shall participate in a substance abuse treatment program as approved, and under the direction of the U.S. Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, or distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendants shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by the law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer of special agent of the law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
No. 92-9253

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

RICHARD WILLIAMS,
WILLIAM SCOTT HAMES,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United
States District Court for
the Northern District of Georgia

Before DUBINA, Circuit Judge, RONEY and ESCHBACH, Senior Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgement of convictions and sentence imposed as to Hames in these causes be and the same are hereby AFFIRMED; and that the judgment of conviction of Williams in these causes be and the same is hereby AFFIRMED; and that

the sentence imposed by said District Court as to Williams in these cause be and then same is hereby VACATED and REMANDED to said District Court of resentencing in accordance with the opinion of this Court.

Entered: July 31, 1995

For the Court:
Miguel J. Cortez, Clerk

/s/MATT DAVIDSON
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-9253

UNITED STATES OF AMERICA,

Plaintiff-Appellee-
Cross-Appellant,

versus

RICHARD WILLIAMS
WILLIAM SCOTT HAMES,

Defendants-Appellants-
Cross-Appellees.

On Appeal from the United
States District Court for
the Northern District of Georgia

ON PETITION (S) FOR REHEARING AND SUGGESTION (S) OF REHEARING EN BANC

Before: DUBINA, Circuit Judge, RONEY and ESCHBACH, Senior Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion (s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE